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89-826

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

FIRST ENGLISH EVANGELICAL LUTHERAN CHURCH OF GLENDALE, A CALIFORNIA CORPORATION,

Petitioner,

v.

COUNTY OF LOS ANGELES, CALIFORNIA,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeal Of California, Second Appellate District, Division Seven

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF REALTORS® IN SUPPORT OF PETITIONER

RALPH W. HOLMEN
430 North Michigan Avenue
Chicago, Illinois 60611
(312) 329-8375

Counsel for Amicus Curiae
NATIONAL ASSOCIATION OF REALTORS®

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

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BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF REALTORS® IN SUPPORT OF PETITIONER*

IDENTITY OF AMICUS

The NATIONAL ASSOCIATION OF REALTORS® (hereinafter "NAR") is a not-for-profit professional association comprised of approximately 800,000 persons engaged in all phases of the real estate business.

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* All parties of record in this case have consented pursuant to Supreme Court Rule 36.1 to the filing of this *amicus curiae* brief in support of Petitioner. These consents are filed herewith.

NAR was created in 1908 to promote and encourage the highest and best use of the land, to protect and promote private ownership of real property and to advance professional competence in the rendition of real estate services.

NAR includes among its members real estate brokers, managers, appraisers, counselors, and a variety of other participants in the residential, commercial, industrial, farm and investment real estate markets. Through its many programs and the programs of its affiliated Institutes, Societies and Councils, NAR has been involved in and committed to the solution of the significant problems encountered by property owners for over three quarters of this century.

Of the problems which have concerned NAR, few, if any, have been more fundamental or of greater importance than the preservation of private property rights as established by the United States Constitution. This commitment to private property rights is the cornerstone of NAR, for without such rights there would be no ownership, development, transfer, or enjoyment of real estate.

INTEREST OF AMICUS

NAR's longstanding and vigilant concern for the preservation of private property rights compels its attention to the threat presented by the decision of the court of appeal in this case to property owners and property ownership nationwide. At stake is the protection afforded property owners by the Fifth and Fourteenth Amendments to the United States Constitution against the uncompensated "taking" of their property, and the corresponding

rights and benefits of property ownership. The decision below, unless remedied by this Court's review, will substantially if not entirely undermine the viability of the protection provided by those Constitutional provisions and this Court's precedents interpreting them.

NAR is particularly able to recognize the gravity of this threat. Not only does its membership span the entire nation, but these members are involved in upwards of 80% of real property resale transactions. This comprehensive involvement at the grassroots level of land development, investment and sale provides NAR with a clear understanding of the impact regulatory actions such as the one at issue here have on the enjoyment and exercise of Constitutionally protected property rights.

NAR does not propose to duplicate the legal arguments presented in the Petition for Writ of Certiorari. The facts in this case and its history are well-known, and NAR endorses and urges to this Court the Statement of the Case and legal arguments set forth in the Petition. The purpose of NAR in submitting this brief *amicus curiae* is to add the voices of the hundreds of thousands of NAR members and the millions of American property owners they serve to the chorus of others concerned with the devastating effect of the decision of the court below on the private property rights guaranteed by the Constitution.

INTRODUCTION

American property owners breathed a collective sigh of relief when in 1987 this Court issued its' opinion in the first appearance of the present case before this Court, *First English Evangelical Lutheran Church v. County of*

Los Angeles, 482 U.S. 304 (1987) ("*First English I*"), which held that compensation must be paid for temporary regulatory takings. That decision meant that governments could no longer prohibit or limit the use of property without risk of liability for payment of compensation if such regulation was deemed excessive and therefore a "taking" under the Fifth Amendment. This Court carefully limited that decision to the remedial question of whether a suit for compensation must be allowed or whether a property owner could be relegated to a suit seeking invalidation of an alleged regulatory taking, and did not address the nature of regulation which constitutes a compensable taking. Nevertheless, it was widely believed that that decision would cause regulators to more conscientiously consider whether proposed regulatory prohibitions on property use might constitute compensable takings, so as to avoid them or provide compensation therefor.

If the decision below is illustrative of the protection to be afforded property owners under *First English I* and this Court's other precedents, then that belief was badly misguided. The decision of the court of appeal distorts the clear language of this Court's opinion in *First English I*, is based on the court's speculation and hypothesis rather than facts established at trial, and relies on an incorrect and heretofore unrecognized test for determining when a regulation does, in fact, constitute a taking. As a consequence of these flaws, the decision below provides a graphic example of the inefficacy of this Court's reliance on an "ad hoc" approach to determining when regulatory action constitutes a compensable taking, rather than a precise formula capable of producing consistent and predictable results. More significantly, adoption by other courts of the principles inherent in the decision below will essentially eliminate the protection provided property owners by the Fifth Amendment's Just Compensation Clause.

NAR urges this Court to issue the Writ of Certiorari sought by Petitioner to rectify the injustice which the decision below works on Petitioner, to declare that the court of appeal has manifestly misunderstood and misapplied this Court's precedents, to provide both property owners and regulators alike a comprehensible formula for determining regulatory takings which violate the Fifth Amendment, and, most importantly, to restore vitality and meaning to the Just Compensation Clause of the Fifth Amendment.

ARGUMENT

I.

THE COURT OF APPEAL INCORRECTLY APPLIED THE "PUBLIC SAFETY EXCEPTION" TO THE PROHIBITION AGAINST UNCOMPENSATED TAKINGS.

The court of appeal correctly recognized that certain uses of property can be prohibited without the prohibition being deemed a compensable taking. Such uses are those which are so injurious or offensive to the public health, safety or welfare that the owner cannot be said to have a "right" to use his property in such a noxious fashion, and therefore prohibiting such use cannot be a deprivation of any property right. This Court has established that principle in such cases as *Goldblatt v. Hempstead*, 369 U.S. 590 (1962), *Hadacheck v. Sebastian*, 239 U.S. 394 (1915), and *Mugler v. Kansas*, 123 U.S. 623 (1887), and reaffirmed its' viability most recently in *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470 (1987).

Rather than applying this well-recognized principle simply to prohibit uses which are patently harmful to the

public well-being, however, the court of appeal employs it in a manner which has the effect of insulating essentially any regulatory prohibition on property use from challenge as a taking if it arguably advances any public interest. This result follows directly from the fact that the court's conclusion is founded on a "record" consisting merely of the allegations contained in Petitioner's complaint and the judicial notice which the court takes of the challenged ordinance itself. Thus, under the court's extraordinarily deferential approach, a regulation need not even address a genuine threat to the public weal or be carefully devised to prevent or mitigate that harm, so long as the regulation *recites* the identity of the perceived threat and that the purpose of the regulation is to abate it.

In this case, the court accepted the validity of the flood hazard safety concerns of Respondent county, and accepted Respondent's view that a prohibition on building in the area which includes Petitioner's property was necessary and would be effective to shield the public from that hazard. Because the court did not order a trial to determine the facts in this case, however, those conclusions were not based on factual evidence offered by Respondent, nor was Petitioner offered the opportunity to contest those factual conclusions. The court's superficial approach allows the "public safety exception" to be judged applicable in a given case based on facts assumed by the court, rather than those alleged and proven by the regulator.[1]

[1] The "public safety exception" is a justification advanced by a regulatory body in defense to a claim that a regulation or ordinance constitutes a taking. Thus, it should be pleaded and proven by the regulatory body asserting that defense. A property owner claiming that an ordinance constitutes a taking is should not be required to specifically plead and prove the *absence* of such a justification for the ordinance.

Elimination of a property owner's opportunity to challenge either the presence of a genuine public injury to be alleviated by a regulation, or the capability or necessity of the particular regulation to accomplish that purpose, is, of course, grossly unfair. While NAR concurs with the court that the preservation of life ranks at or near the top of the public interests to be served by the police power, even that interest should not be served at the expense of property owners' rights to use their property when the need for and effectiveness of limitations imposed on those rights are factually unsupported.[2]

More significantly, however, this application of the "public safety exception" to alleged regulatory takings will allow regulators to conveniently, uniformly and consistently defeat all challenges to ordinances as takings, and therefore will eliminate the risk of their ever having to pay just compensation for imposing a regulation which "goes too far." A clever regulatory body need simply identify, when adopting an ordinance limiting the use of property, a perceived injury to the public well-being to be deterred or eliminated by the ordinance, and indicate that the ordinance is intended to mitigate or alleviate that injury. A court considering a subsequent challenge to that regulation as a taking could, following the court of appeal's precedent in this case, simply accept the government's regulatory justification, and dispense with the inconvenience of subjecting such justification to scrutiny at trial. Such extraordinary and blind deference to the legislative or regulatory body, particularly when all or even a substantial

[2] Whether this exception goes so far as to permit denial "all use" of property to prevent a public injury, where facts adduced at trial actually establish the spectre of such injury and the effective elimination of it by prohibiting all use of the property, is a separate question, not raised by the posture of this case.

measure of Constitutionally protected property rights are at stake, should not be tolerated.

Perhaps the most revealing illustration of the court of appeal's failure to understand and apply this Court's direction in *First English I*, and the corresponding failure of the court to decide the case on facts, is the manner in which the court takes out of context, and thus badly distorts, this Court's language in *First English I*. In order to indicate the narrow scope of its holding, this Court said:

> [W]e accordingly have no occasion to decide whether the ordinance at issue actually denied (Petitioner) all use of its property or whether the county might avoid the conclusion that a compensable taking had occurred by establishing that the denial of all use was insulated as a part of the State's authority to enact safety regulations. . . . *These questions, of course, remain open for decision on the remand we direct today.*

First English I, at 313 (emphasis added).

That language plainly imposes on "the county (the burden to) *avoid* the conclusion that a compensable taking had occurred by *establishing*" the applicability of this public safety exception. Because the court of appeal did not require the county to carry this burden at trial, however, the court considers these questions without the benefit of any factual foundation. The court justified its conclusion by manipulating the above-quoted language to appear as if it were this Court's affirmative statement:

> In the words of Chief Justice Rehnquist, the ordinance did not 'actually [deny] (Petitioner) all use of its property' and in any event 'the denial of all use was insulated as a part of the State's authority to enact safety regulations.

First English Evangelical Lutheran Church v. County of Los Angeles, 210 Cal. App. 3d 1353, 258 Cal. Rptr. 893, 905-06 (1989).

Unless condemned by this Court on review, other courts will similarly be tempted, or perhaps even encouraged, to apply a similar *per se* rule to other legislative or regulatory limitations on the use of property, thereby allowing regulators to sidestep the claim that such limitations are prohibited uncompensated takings of property by asserting the State's authority to enact safety regulations. This Court should grant the Writ sought by Petitioner to declare such that no such *per se* rule applies, and to confirm that owners of property affected by such limitations must have the opportunity to demonstrate that the purported menace to public safety is not genuine, or that the limitation or prohibition on property use is ill-suited to prevent that harm.

II.

THE COURT OF APPEAL INCORRECTLY DETERMINED THAT NO TAKING HAD OCCURRED BECAUSE ALL USE OF PETITIONER'S PROPERTY HAD NOT BEEN DENIED.

As an independent basis for rejecting Petitioner's claim for compensation for the taking of its property by Interim Ordinance 11,855, the court of appeal concluded that Petitioner had not been denied "all use" of the property. In doing so, the court of appeal makes two fundamental errors which require this Court's review and correction.

First, the court incorrectly asserts that no taking has occurred and thus no compensation is necessary because Petitioner was not denied "all use" of its property. This Court has never held that denial of *all* use is the proper test of whether a regulation constitutes a taking. Significantly, the court relies on a law review article, rather than any decision of this Court (or any other court), for its novel and unprecedented view of what constitutes a

taking.[3] For this reason alone the court's decision is plainly flawed and this Court should grant the Writ to correct it.

Second, even assuming that the court's "denial of all use" test for a taking was correct, the court's analysis of that factual question suffers from the same critical defect as its application of the "public safety exception." The court denies Petitioner the chance to establish at trial facts demonstrating that the property is not, in fact, suitable for the other uses which the court postulates, or any others. Rather, the court substitutes its own speculation regarding other uses of the property which might be enjoyed by Petitioner, and concludes that the hypothetical availability of such other uses is adequate to defeat Petitioner's claim that the property has been taken.

It is, for example, conceivable, and perhaps even likely, that the remaining permissible uses which the court envisions ("many camping activities . . . meals could be cooked, games played, lessons given, tents pitched . . . ," 210 Cal. App. 3d ____, 258 Cal. Rptr. at 902) are no longer

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[3] Falik and Shimko, *The Takings Nexus: The Supreme Court Forges a New Direction in Land-Use Jurisprudence*, 23 Real Prop., Prob. & Trust L.J. 1 (1988). Further evidencing the court's misplaced reliance on this authority, the article itself relies on *Agins v. City of Tiburon*, 447 U.S. 255 (1980), simply for the familiar proposition that to be a taking a regulation must only "den(y) an owner economically viable use of his land," *Id.*, at 4, rather than concluding that "all use" of the property must be denied, as the court below asserts. Indeed, the article relied on by the court expressly *rejects* the interpretation the court derives from it: "[T]o adopt the standard that all use of property must be eliminated for a regulation to be regarded as invalid, the court would need to ignore years of jurisprudence indicating that a taking can be found if a property owner was denied all *reasonable, economically viable* use of its property." *Id.*, at 43 (emphasis in original).

feasible because of the condition of the property after the flood. Surely conclusions regarding permissible uses of the property which genuinely remain are conclusions of *fact* which require trial to determine.[4]

To be sure, the court's conclusion—that the property may still be used in the manner described and that such uses are likely to be valuable and beneficial to Petitioner—has a certain logical appeal. But such logic must be supported by facts, which must be developed at trial and examined in the specific context of the nature of the property, the property owner and the particular uses still permitted, rather than on the musings of the court. This Court's review and rejection of the conjectural analysis of the court of appeal is therefore necessary if owners of property are to enjoy any meaningful protection under the Fifth Amendment's Just Compensation Clause. If indeed courts may conclude that deprivation of an owner's right to use his property in certain ways does not constitute a taking because the *court itself* can *imagine* some other uses for the property, then the Fifth Amendment's prohibition against uncompensated regulatory takings, as construed by *First English I* and this Court's other precedents, is truly emasculated.

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[4] The court even suggests that the utility of particular permissible uses of the property are to be considered in light of the nature and identity of the property owner when it notes that "(I)f (the property) had been a factory or a coal mine, these sorts of (outdoor recreational) uses would have meant little to the landowner. But (the property) is a camping facility. So uses of value to that purpose remained available. . . ." 210 Cal. App. 3rd at ____, 258 Cal. Rptr. at 902. If it is indeed proper to determine the nature and viability of any remaining permissible uses of a regulated property based on the value of those uses to the *particular* owner, that question is quite obviously one of *fact*, and thus *not* appropriate for an appellate court to decide, as did the court here.

The court of appeal and other courts tempted to follow that court's lead must be instructed that a regulatory scheme need not deny "all use" of a property to constitute a taking and that this Court has never so held, and that judicial speculation regarding the existence and value of uses theoretically remaining available to a property owner may not be used in place of facts placed in evidence. To insure that the Fifth Amendment's guarantees have continuing vitality for property owners, this Court should issue the Writ sought by Petitioner.

III.

THIS COURT'S REVIEW IS NECESSARY TO CLARIFY AND CONSOLIDATE THE MYRIAD OF FORMULATIONS EMPLOYED FOR IDENTIFYING COMPENSABLE TAKINGS.

The errors of the court of appeal described above, as well as those articulated in the Petition itself, without more, demonstrate the critical necessity for this Court to issue the Writ sought by Petitioner. The mere existence of these defects in the court of appeal's analysis, as well as the extensive scholarship addressing "takings" jurisprudence[5], suggest a more fundamental problem: The criteria which this Court as well as lower courts have heretofore used to determine if a compensable taking has occurred are simply inadequate for that purpose. Such multiple criteria permit courts to reach inconsistent and unpredictable results, which is hardly what one expects, or what American property owners deserve and require, from a principle of Constitutional law. This Court's attention to

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[5] See, e.g., the opinion of the court of appeal below, n.7, 210 Cal. App. 3d ____, 258 Cal. Rptr. at 897, and the list of publications identified in the Petition itself, pp. xii-xv.

this problem is therefore necessary to bring order to the manner in which courts henceforth resolve this critical Constitutional question.

It is often noted, for example, that this Court has acknowledged that "[T]he question of what constitutes a 'taking' for Fifth Amendment purposes has proved to be a problem of considerable difficulty . . . . (for which no) 'set formula' " has been developed, *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 123-24 (1978), and a question which can only be resolved by engaging in "ad hoc, factual inquiries" in each case, *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979). Indeed, this confusing state of affairs is reminiscent of the Chief Justice's characterization of this Court's First Amendment decisions applicable to billboard regulation as "a virtual Tower of Babel, from which no definitive principles can be clearly drawn." *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 569 (1981) (Rehnquist, J., dissenting).

A variety of tests have heretofore been applied by this Court to the takings question, including, for example, the following:

1. Whether the ordinance denies the owner the opportunity to pursue any "economically viable use," *Agins v. City of Tiburon*, 447 U.S. at 260;
2. Whether the ordinance precludes or interferes with the owner's "reasonable, investment-backed expectations," *Penn Central*, 438 U.S. at 124;
3. Whether the ordinance fails to advance legitimate state interests, *Agins*, 447 U.S. at 260;
4. Whether the ordinance denies the owner the opportunity to "secure an average reciprocity of advantage", *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 415 (1922);

5. Whether the ordinance results in a physical occupation of the property, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 411, 433 (1982);
6. Whether the ordinance destroys a "major portion" of the property's value, *First English I*, 482 U.S. at 329 (Stevens, J., dissenting).

There is also the "either/or" test applied by the court below in this case, that is, whether the ordinance fails to "substantially advance a legitimate public purpose *or* deprives the landowner of 'all use' of the property," 210 Cal. App. 3d ____, 258 Cal. Rptr. at 901, although as discussed above, *supra*, pp. 9-10, the latter prong of that test is supported by neither this Court's precedents or even the authority which the court itself relies on.

Of course, each of these tests is not wholly distinct from the others, and a particular ordinance may reasonably be judged to be (or not to be) a taking under more than one. Nevertheless, because the tests are not congruent, the result in a particular case often will depend on the test(s) selected. That this Court has found it necessary or desirable to articulate such a multiplicity of tests, however, reveals that any one of these tests is incapable of producing a satisfactory and proper result in all cases. NAR therefore urges this Court to issue the Writ of Certiorari sought by Petitioner in order to undertake a renewed effort to develop a coherent and uniformly applicable formula for determining when a regulation is a "taking," despite the obvious and considerable difficulty which this Court has previously encountered in doing so. Even a consolidation of this plethora of approaches to the identification of regulatory takings, without achievement of the optimal objective of developing a single, comprehensible test,

would be of extraordinary value to both property owners and governmental bodies charged with the authority or duty to regulate the use of property. Regulators will benefit by being better able to avoid the unintentional adoption of ordinances which constitute takings, and thus to avoid the obligation to pay compensation to owners of properties taken by such ordinances. Property owners will benefit by gaining a better understanding of the types of ordinances which can reasonably be challenged as takings, and those which cannot. And finally, both owners and regulators will benefit from a diminished need to litigate the question of whether a particular ordinance constitutes a "taking," since they will be able to more reliably determine *in advance* the probable result of such litigation. Thus, perhaps the "great deal of litigation" feared by Justice Stevens as a result of *First English I*, 482 U.S. at 322, can be avoided.

CONCLUSION

The decision of the court of appeal utterly fails to grasp the meaning of this Court's holding in *First English I* and other cases involving regulatory takings. In light of the significance and the renown of *First English I*, however, the holding of the court below undoubtedly is and will continue to be regarded by other courts as an important statement about the meaning of the Just Compensation Clause as applied to regulatory takings. Thus, the fundamental flaws contained in that decision will, unless this Court acts, be multiplied manyfold. American proper-

ty owners cannot and should not be required to tolerate the appropriation of their rights which will result.

For the foregoing reasons, NAR urges this Court to grant Petitioner's Writ of Certiorari.

Respectfully submitted,

RALPH W. HOLMEN
430 North Michigan Avenue
Chicago, Illinois 60611
(312) 329-8375

Counsel for Amicus Curiae
NATIONAL ASSOCIATION OF REALTORS®

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